Supreme Court, U.S.
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(3)

No.. 01-519

IN THE
# Supreme Court of the United States

GABRIELE OMLIN,

*Petitioner,*

v.

KAUFMAN & CUMBERLAND L.P.A.,

*Respondent.*

**On Petition for Writ of Certiorari to the Unites States Court of Appeals for the Sixth Circuit**

## REPLY TO BRIEF IN OPPOSITION

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15 pp

## QUESTIONS PRESENTED

1. Whether a state statute of limitations for legal malpractice should be tolled until the underlying adverse decision is affirmed on appeal and an injury in fact and the standing to sue is established?

2. Whether federal courts should adopt an intermediate state court decision and grant a law firm, incorporated as legal professional association, immunity from being sued for breach of written contract, breach of fiduciary duty, fraud, negligence, and infliction of emotional distress?

3. Whether a properly amended complaint and court certified copies of state courts' proceedings and an opposing affidavit supported by copies of the business record are material of the type specified under Fed. R. Civ. P. 56(c) to be considered in determining whether to grant judgment as a matter of law?

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Petitioner appreciates Respondent's correction of Appendix B to the Petition.

**1. Respondent errs in its cross-question presented that the case does not involve federal questions or constitutional issues (Brief in Opp. p. *i*)**

Respondent's cross question

> "Should the Supreme Court accept for review the decisions of federal courts in Ohio which correctly applied the statute of limitations for lawyer malpractice in an action venued in Ohio against Ohio lawyers alleging malpractice in their conduct of litigation for the client in Ohio state courts, where no federal question or constitutional issue was involved?"

is - if of any bearing - fairly contained in Petitioner's three questions presented for review. (p.i. before).

Petitioner's action is not "an action venued in Ohio against Ohio lawyers alleging malpractice in their conduct of litigation for the client in Ohio state courts", but is an action for breach of written contract, breach of fiduciary duty and fraud against a corporation incorporated as legal professional association in Ohio (Pet, p.22; Brief in Opposition, Appendix B, p.2a, District Court Memorandum & Order).

The court below did not correctly apply the state statute of limitations for lawyer malpractice (see § 3, p.3 below) and its decision invokes both constitutional and federal questions (see § 4 through § 6, p.5 – p.9 below).

**2. Both perceived misstatements pointed out in Respondent's brief in compliance with Rule 15.2 of this Court did not occur**

rendering the statement of the case as set out in Petitioner's brief the undisputed facts material to consideration of the questions presented for review.

Rule 15.2 of this Court mandates that

> " *** the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition."

Respondent points out two of such perceived misstatements both of which were erroneously identified as unfactual:

> (a) Footnote 1: The statement is factual[1]. the inspection issue was settled by agreement (Joint App. p.1089; R.[2] 45, Vol. 3-3, E-20).

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[1] The perceived misstatement is not on page 3 of petitioner's brief, but on page 4.

[2] R = Record in the district court.

(b) Footnote 2: The facsimile notice[3] of appeal is reflected in the record (Joint App. p.586; R. 43, Vol. 1-22, Court certified copy of the municipal court docket sheet case no. 96CVG-00205).

Respondent's remaining statement of the case does not point out any other perceived misstatements. It is a mixture of statements of fact and law misrepresented/misapplied by respondent's various employees in their state courts' pleadings and consequently reflected in the state courts' judgments. These statements contain material identified by petitioner on appeal as genuine issues of fact and law (Pet. p.8 – p.10). The page limitation of this brief does not allow them all to be corrected individually. Therefore, Respondent's statement of the case is herewith summarily objected and those misstatements/omissions material to consideration of the questions presented for review are individually corrected in the endnote (p.10 below) as far as possible within the page limitation.

**3. Respondent errs in contending that the decision of the Sixth Circuit does not invoke any of the grounds for review recognized by Rule 10 of this Court**

The silent denial of the courts below to toll the state statute of limitations for malpractice until the underlying adverse decision was affirmed on appeal on December 18, 1998 (App. Brief p.29) is in conflict with previous decisions of if own Sixth Circuit, the Fifth Circuit, the Seventh Circuit and the Eleventh Circuit, tolling state statutes of limitations for legal malpractice until the underlying adverse judgment is affirmed on appeal and the injury is certain (Pet. p.12 – p.21).

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3 Due to the time difference this fax dated July 27, 1996 was already received/entered in the court journal on 07-26-96.

The Sixth Circuit's decision is further in conflict with a decision of the Federal Circuit applying the statute of limitations for written contracts when the acts of malfeasance is based on a written legal representation agreement.

In addition, Petitioner has cited decisions of courts of last resort of the states of Arizona, Arkansas, Florida, and Texas, which also apply the tolling rule.

The split between the decision of the Sixth Circuit and the above cited Circuits invokes Rule 10(a) of the Supreme Court Rules providing as reason to grant a writ in pertinent part:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

The issue is especially important because in *Pioneer Inv. Servs. v. Brunswick Assocs.* 507 U.S. 380 this Court approved that courts transfer to clients acts and omissions of their attorneys, but gave no guidelines whether *Pioneer* influences the application of state limitation periods. As a result the state courts across the country developed an array of different methods for the application of the *Pioneer* ruling (Pet. p.12 – p.21).

*Pioneer* has not resulted in any federal or state codified law, but is a judicial decision of this Court. The broad and nationwide difference in the application of the *Pioneer* ruling calls for an exercise of this Court's supervisory power for the purpose of reaching a nationwide uniform application of this decision. Clarification of this issue will avoid needless litigations and shorten the procedure in justified ones.

The Sixth Circuit court's denial to consider Petitioner's amended complaint further invokes this Court's supervisory power to settle the question whether federal courts when ruling on motion for summary judgment under FRCP 56 should consider a properly amended complaint (FRCP 15).

The Sixth Circuit's decision to disallow Petitioner to sue the Respondent for breach of written contract based on the intermediate state court's decision in *Muir v. Hadler Real Estate Mgmt. Co.*, 446 N.E.2d 820, 822 (Ohio Ct. App. 1982) is a challenge to the contract clause, and the equal protection and due process clause of the Constitution invoking Rule 10(c) of the Supreme Court Rules stating

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be settled, by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

**4. Respondent errs that the courts below properly applied Ohio law concerning the period of limitations for actions against lawyers for malpractice**

The courts below (App. Brief p.29) did not determine the *external cognizable event*, and did not determine it

*separately* for each *particular transaction,* as applied by the highest state court in *Zimmie v. Calfee Halter & Griswold,* 538 N.E.2d 398, 402 (Ohio 1989) and by the Sixth Circuit in *FDIC v. Alexander,* 78 F.3d 1103 (1996).

In addition, the record demonstrates that there remain genuine issues of fact regarding the termination of the attorney-client relationship (App. Reply Brief p.8).

As an aside, Petitioner's two letters of January 6, 1998 which the courts below found having terminated the attorney-client relationship were requested and drafted by Respondent and do not say that the attorney-client relationship is terminated. Thus, they are ambiguous with respect to the date when the attorney-client relationship terminated (Mot. for Rehearing en banc, p. 11). In *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Oklahoma*, 00-292, decided April 30, 2001, this Court held that

> "[I]n appropriate cases, this Court applies the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it".

**5. Respondent errs that the Sixth Circuit's decision does not disallow breach of contract suits [by clients] against [their] attorneys**

and Respondent does not cite any authority to the contrary. On the other hand, there are at least 38 cases (Westlaw©) in which the intermediate courts disallowed clients to sue their attorneys for breach of contract, e.g.: *Soler v. Evans*, No. 99AP-1020; *Endicott v. Johrendt*, No. 99AP-935; *Bauer v. Georgeff,* No. 97APE03-313; *Doolittle*

*& Burroughs*, No. 97APE09-1262; *Thatcher v. Grubler*, No. 97APE05-733; *Harris, McClellan, Binau & Cox v. Elkins*, No. 96APE12-1634.

In fact, the Sixth Circuit did disallow petitioner's claims *for breach of a [written] contract, breach of fiduciary duty, and fraud* based on the *Muir* ruling that

> "[I]t makes no difference whether the professional misconduct is founded in tort or contract, it still constitutes malpractice. Accordingly, the one year malpractice statute of limitations set forth in R.C. 2305.11 is applicable." *Id.* at 822.

Relying on *Muir* the Sixth Circuit court reduced all Petitioner's causes of action in a single one regardless of their different applicable statute of limitations and regardless of the state statute providing in

> R.C. 2305.012:
> A cause of action shall be considered to accrue for all purposes as terminated by the statute of limitation that applies to that cause of action.

The Sixth Circuit court also disregarded the Federal Rule of Civil Procedure[4] providing in

> Rule 18(a) Joinder of Claims:
> A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, or maritime, as the party has against an opposing party.

[4] Equivalent to Rule 18 Ohio Rule of Civil Procedure

Ohio strictly separates contract actions from tort actions. *Tort* is defined as

> "private *noncontract* civil action by which the injured party may seek redress for his or her injuries. Such actions are commonly referred to as torts." See, e.g. 2315.21(4); see, also, *Haag v. Cuyahoga Cty* (N.D Ohio 1985), 619 F.Supp. 262, 276-277.

The *Muir* decision does not only invoke the contract clause, the equal protection and due process clause of the United States Constitution, but seems to be also in conflict with the right-to-remedy and open-courts provision of the Constitution of the state of Ohio.

In addition, the Sixth Circuit's adoption of the *Muir* decision is also questionable under the substantial overbreath rule contained in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The *Muir* ruling does not only inflicts the Ohians, but was also imported by the Idaho Supreme Court in *Griggs v. Nash*, 775 P2d 120, 124 (1989).

**6. Respondent errs in contending that the courts below did not fail to consider Petitioner's amended complaint or her opposing affidavits**

Comparing in verbatim the district court's citation of § 8 and §10 of the complaint with § 8 and § 10 of the amended complaint, Petitioner demonstrated on appeal (App. Brief p.10 - p.12) that only the original complaint was before the court and that it did not consider the amended complaint.

On appeal Respondent admitted that the district court's findings were "consistent with the affidavit of Frank J. Cumberland" (Respondent's App. Reply Brief, P. 13). Petitioner had contradicted all statements in Cumberland's affidavit in her opposing affidavit and demonstrated with supporting letters and invoices that Respondent continued to give Petitioner legal advice through January 8, 1998 and resumed Petitioner's external representation through January 14, 1998 and continued to charge Petitioner for this through January 14, 1998 (Pet. Appendix F, p.225a; App. Brief p. 4; Joint App. p.382 - p.390, p.60 - p.461; R. 39 and R. 40, Opposing Affidavits; Joint App. p.436 - p.437, Invoice for January 1998).

The amended complaint contains particular dates and occasions when the breach of the contract occurred. As the dismissal of the case was based exclusively on limitation grounds, the courts' error to receive the amended complaint had a decisive bearing on the courts' decisions.

## CONCLUSION

This case presents serious federal and constitutional questions with regard to the rights clients have against a law firm. Petitioner respectfully requests this Court grant certiorari to review them.

Respectfully submitted,

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## [5] Endnote

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[5] 1. Brief in Opp. p.6: Respondent's statement that petitioner "terminated her attorney-client relationship with Kaufman and Cumberland one year and two days" before she "filed a malpractice complaint against them" and that the "complaint was filed two days after the expiration of the Ohio statute of limitations for legal malpractice actions" remain a disputed genuine issues of fact and law incorporated in the questions presented for review.

2. Brief in Opp. p.2: Petitioner's visa did not expire on March 30, 1996 but on April 18, 1996 (Joint App. p.594, Visa; p.1028, Bill Cleveland Clinic for treatment on April 2, 1996; p.601, Boarding Pass of April 9, 1996).

3. Brief in Opp. p.5: Petitioner did pay another $10'000 for the appeal (Joint App. p.608, Check December 9, 1997).

4. Brief in Opp. p.3: Mr. Cumberland did not explain the risks of nonsuccess or financial issues. He did not argue in briefs the Hague [Service] Convention. The brief was drafted and filed by an employee with 1 year experience. The Convention does not give more time to appeal than the rules for appellate procedure, but deals only with the service of judicial and extra-judicial documents abroad (Joint App. p.673, Convention).

5. Brief in Opp. p.4: The young attorney wrongly invoked Article 16 and not the only relevant Article 10 of the Convention; a motion for reconsideration was denied because Art. 10 was not raised in the appellate brief and because the young employee did not cited any authority (Joint App. p.153; judgment page Case. 96-L-147; R. 43, Vol-1-7).

6. Brief in Opp. p.5: Petitioner engaged other counsel on January 9, 1998 for the single purpose to attend the pre-trial conference in the Cuyahoga County court scheduled for January 14, 1998 and to file a voluntary dismissal as recommend by Mr. Cumberland and to file an appearance in the Lake County court for the single purpose to receive the judgment pending in Lake County (Pet. Appendix F, p.24a - 25a).